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AUTHORITIES CITED.

ACTS AND TREATIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

WIRT K. WINTON, ADMR. OF THE ESTATE of Charles F. Winton, deceased, et al., appellants,
v.
JACK AMOS AND OTHERS, KNOWN AS the Mississippi Choctaws, appellees.

No. 123.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF DEFENDANTS.

STATEMENT.

This suit was brought under a special act of Congress approved April 26, 1906 (34 Stat. 140), by the appellants against Jack Amos and 2,000 other individual Mississippi Choctaws, citizens of the United States and the State of Mississippi. It is alleged the appellants made 834 different contracts in the State of Mississippi. Suit was brought for alleged services rendered in procuring certain legislation in Congress by which the rights of said Indians under article 14 of the treaty of September 27, 1830, to enrollment as citizens of the Choctaw Nation and allotment of Choctaw and Chickasaw tribal lands were secured (Rec. 1–15, 112, 135).

The original petition was filed October 11, 1906, and the amount claimed, in accordance with the terms of said contracts, was 50 per cent of the amount alleged therein to have been secured to said Indians, one-half of the estimated value of $25,000,000.

On May 29, 1908 (35 Stat. 457), an act was passed amending the act of April 26, 1906, *supra*, and on November 23, 1911, the appellants filed their second amended petition, claiming under the original and amended acts (Rec. 16–30).

The original petition was filed by Wirt K. Winton as one of the heirs at law of Charles F. Winton, deceased, and by Robert L. Owen for himself and others (Rec. 15). The second amended petition was filed by William H. Robeson, attorney for petitioners (Rec. 15), and Robert L. Owen appearing for himself, and the affidavit to the second petition was made by "James K. Jones, administrator of James K. Jones, deceased," and signed by William H. Robeson (Rec. 30).

The amount claimed by the appellants in their proposed findings in the court below was 15 per cent of $16,000,000, the estimated value of the entire property acquired by the Mississippi Choctaws by virtue of their enrollment as citizens of the Choctaw Nation, or $2,400,000 (Rec. 164).

The associates of Charles F. Winton, deceased, were Robert L. Owen of Oklahoma, James K. Jones, deceased, Walter S. Logan of New York, deceased,

Preston S. West of Oklahoma, Frank B. Crosthwaite, and John Boyd of the District of Columbia (Rec. 97).

By article 3 of the treaty of September 27, 1830 (7 Stat. 333), known as the Treaty of Dancing Rabbit Creek, the Choctaws ceded all of their lands east of the Mississippi River and agreed to remove west of that stream during the years 1831, 1832, and 1833.

By article 14 of the treaty each head of a family who desired to remain and become a citizen of the States was permitted to do so on signifying his intention to the agent within six months after the ratification of the treaty, and he thereupon became entitled to receive one section of land, and each unmarried child over 10 years of age to one-half section, and each child under 10 years of age to one-quarter section adjoining the lands of the parent. If they continued to reside on the land for a period of five years from the ratification of the treaty they would receive grants in fee simple. They were not, however, to lose the privilege of becoming Choctaw citizens, if they should ever remove west to the Choctaw Nation, but were not entitled to receive any portion of the Choctaw annuity which arose from the sale of the lands under the treaty of 1830. The mixed bloods who remained in Mississippi, were provided for under section 19 of the treaty, while the full bloods who remained and elected to become citizens of the State, were provided for under article 14, from which the full-blood Mississippi Choctaws have

always been called "fourteenth article claimants" (Rec. 97, 98).

The Choctaws who remained in Mississippi after the removal of the nation to the west were made citizens of the United States and the State of Mississippi many years before the events occurred out of which this litigation arose, and had adopted the dress, habits, customs, and manner of life of the white citizens of the State. They had no tribal or band organizations or laws of their own, but were subject to the laws of the State of Mississippi. No funds were ever appropriated by the Government for their support, although they received a great deal of land. They did not live upon any reservation, nor did the Government exercise any supervision or control over them. Neither the Indian Office nor the Department of the Interior assumed or exercised any jurisdiction over them, and never recognized them either individually or as bands, but regarded them as citizens of the State of Mississippi; and the department held that it had no authority to approve any contracts made with them (Rec. 98, 99).

On December 24, 1889, the Choctaw Nation memorialized Congress to provide for the removal of the Choctaws living in Mississippi and Louisiana to the Choctaw Nation; and nothing having been done by Congress, the Choctaw council in 1891 appropriated funds and created a commission for their removal and subsistence, and during the same year 181 were removed and admitted to citizenship in the Choctaw Nation (Rec. 99).

By the act of March 3, 1893 (27 Stat. 645), Congress created the Commission to the Five Civilized Tribes, known as the "Dawes Commission," for the purpose of procuring through negotiation the relinquishment of the tribal title to the lands of the Five Civilized Tribes in the Indian Territory by cession to the United States or allotment in severalty to the members of said tribes with a view to the ultimate creation of a State or States out of the country embraced in said territory. By the act of June 10, 1896 (29 Stat. 321), Congress directed the said commission to make a roll of the Five Civilized Tribes, and required applicants for enrollment to file their applications with the commission within three months from the passage of the act, with right of appeal from its decision to the United States courts (Rec. 99, 100).

On June 23, 1896, Robert L. Owen entered into an agreement with Charles F. Winton, by which said Winton agreed to proceed to Mississippi and to secure contracts with Indians living there who were entitled to participate in the distribution of Choctaw-Chickasaw lands and moneys, binding himself to secure evidence, powers of attorney, and contracts as prescribed by said Owen, who was to provide the funds and Winton was to receive one-half of the net proceeds of the contracts. This agreement was modified on July 23, 1896, by a second agreement between the same parties, which provided that Winton should act as attorney in Mississippi-Choctaw cases and that Owen should have a one-half interest in all of said

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contracts, and that in the event of accident to Winton, Owen should have full authority to take up all Mississippi-Choctaw cases in his place (Rec. 100).

Immediately thereafter Winton went to Mississippi and during the year 1896 and the following years secured contracts with approximately 1,000 full-blood Mississippi Choctaws, some of said contracts having been taken in the name of Winton and some in the name of Owen. Under the terms of these contracts Winton and Owen agreed to secure the rights of citizenship for said Indians in the Choctaw Nation and the right to participate in the allotment and distribution of the lands and funds of the Choctaw-Chickasaw Nation for a fee of one-half the net interest of each allotment in any allotment thereafter secured. These contracts were subsequently abandoned by Owen and Winton because they were void and nonenforceable under the acts of June 28, 1898, and May 31, 1900, and new contracts were thereafter taken in the name of Charles S. Daley, an attorney of New York City. We will refer to the last set of contracts further on. At the time of the making of these contracts the full-blood Mississippi Choctaws were extremely poor, living under insanitary conditions, and working at manual labor for daily wages. Their children were not permitted to attend schools for the whites and were denied all social and political privileges (Rec. 100).

Early in 1896 Robert L. Owen spoke to Hon. John Sharp Williams, the Representative in Congress for

the Fifth Congressional District of Mississippi, where practically all of the full-blood Choctaws in Mississippi lived, with reference to the possible rights of such Indians to participate in the partition of the Choctaw lands in Oklahoma, and at that time submitted to Mr. Williams a copy of the Dancing Rabbit Creek Treaty, and called his attention to article 14. This was the first time the matter had been called to the attention of Mr. Williams. Thereupon, on February 11, 1896, Mr. Williams wrote to the Commissioner of Indian Affairs stating that a great many Choctaws were living in his district and made inquiry as to whether they would come in for anything under the act then pending for a division of the Choctaw lands in severalty. On November 10, 1896, Mr. Williams again wrote to the Commissioner asking information as to the rights of the Choctaws who had remained in Mississippi after the tribe had removed, stating that he had no information on the subject himself. The Commissioner of Indian Affairs referred him to the Commission to the Five Civilized Tribes. Thereafter Mr. Williams suggested or prepared, in conjunction with Senator Walthall in the Senate, and Representative Curtis, chairman of the subcommittee of Indian Affairs, in the House, all the legislation passed in Congress for the benefit of the Mississippi Choctaws until March 3, 1903, when his county was placed in another congressional district and he ceased to represent the fifth district of Mississippi in

the House of Representatives; but after that Mr. Williams was still consulted by the chairman or Member in charge of pending bills upon all legislation concerning Mississippi Choctaws (Rec. 100, 101).

In September or October, 1896, Mr. Owen appeared before the Commission to the Five Civilized Tribes in behalf of Jack Amos and 97 other full-blood Choctaws living in Mississippi, and attempted to secure their enrollment under the act of June 10, 1896, which authorized the commission to enroll Indians residing in the Indian Territory who had filed their applications within three months from the date of the passage of that act, with right of appeal to the United States District Courts of the Territory. The commission refused to enroll them on the ground that they were not residents of the Indian Territory; whereupon an appeal was taken by Mr. Owen to the United States Court for the Central District of the Indian Territory, where the ruling of the commission was affirmed. This decision was afterwards indirectly affirmed by this court on May 15, 1899, in *Stephens* v. *The Cherokee Nation* (174 U. S. 445), where it was held that the court was without jurisdiction to review the decisions of the citizenship courts of the Territory (Rec. 102).

Following the action of the Dawes Commission Charles F. Winton presented three memorials to Congress, in December, 1896, January, 1897, and September, 1897, in which Congress was requested to enact legislation permitting the Choctaws residing in

Mississippi to be enrolled as Choctaw citizens with all the rights, privileges, and immunities of such citizenship, without removal to the Choctaw Nation in the Indian Territory (Rec. 101, 155–159).

At the same time the opinion was rendered in the case of *Jack Amos and others* v. *The Choctaw Nation.* The same territorial court delivered an opinion in the case of *E. J. Horne* v. *The Choctaw Nation*, in which the claimant, a Mississippi Choctaw, had removed to the Choctaw Nation prior to the date of his application for enrollment, and the court held that he was entitled to such enrollment under the provisions of article 14 of the treaty of 1830; that, having proved his descent from an ancestor who had complied with the provisions of the treaty, his degree of Indian blood was immaterial.

In compliance with a resolution drawn by Mr. Owen and introduced by Senator Walthall, of Mississippi, and passed by the Senate on February 11, 1897, the Secretary of the Interior transmitted to that body (1) a copy of the memorial of the Choctaw Nation of December 24, 1889, to Congress; (2) a copy of the deposition of Greenwood Leflore taken on February 24, 1843, before United States Commissioners Clayborne and Graves concerning the importance of article 14 of the treaty of 1830; (3) an extract from the report of United States Commissioners Murray and Vroom, to the President on July 31, 1838, to the effect that in a great number of cases Choctaws entitled to remain in Mississippi

had been forced to remove from reservations granted to them under article 14, the Secretary stating that the last two papers called for were copied from the printed record in the case of the *Choctaw Nation* v. *The United States*, No. 12742, Court of Claims; (4) in reply to the last inquiry of the resolution it was stated that no provision had been found in the Choctaw treaties of 1837, 1854, 1855 or 1868 by which the Mississippi Choctaws had relinquished any rights of Choctaw citizenship that they may have acquired under article 14 of the treaty of 1830, or otherwise (Rec., 103, 105).

On February 27, 1897, Mr. Allen, of Mississippi, introduced a bill in the House of Representatives directing the Dawes Commission to enroll, without delay, as citizens of the Choctaw Nation, the Choctaws residing in Mississippi, providing that such Choctaws should possess at least one-eighth of Choctaw blood (H. R. 10372, 54th Cong., 2d sess.). During the consideration of the bill by the Committee on Indian Affairs of the House, Mr. Owen made an argument before the committee and a favorable report was made by the committee on the bill, but it never passed either House of Congress (Rec., 103).

The Indian appropriation act of June 7, 1897 (30 Stat., 83), contained an item directing the Dawes Commission to "examine and report to Congress whether the Mississippi Choctaws under their treaties are not entitled to all the rights of Choctaw citizenship, except an interest in the Choctaw annuities,"

which was inserted at the instance of Senator Petigrew as a substitute for an amendment offered by Senator Walthall (Rec., 103). After the passage of this act Mr. Owen appeared before the commission in the interest of the Mississippi Choctaws with whom he had contracts (Rec., 104).

On January 28, 1898, the commission, as required by the act of June 7, 1897, made a report to Congress, in which, after referring to its decision requiring the removal of Mississippi Choctaws before they could acquire rights of citizenship in the Choctaw Nation and its affirmance by the citizenship court in the *Jack Amos case*, said that as the time for making application to the commission for enrollment had expired it would be necessary either to extend the time or create a new tribunal for that purpose (Rec. 104).

On June 28, 1898, Congress passed an act, commonly known as the Curtis Act, section 21 of which provided for the making of a roll of the Five Civilized Tribes by the Dawes Commission and contained the following item relating to the Mississippi Choctaws:

> Said commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation concluded September twenty-seventh, eighteen hundred and thirty, and to that end may administer oaths, examine witnesses, and perform all other acts necessary thereto and make report to the Secretary of the Interior. * * *

> No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship: *Provided, however,* That nothing contained in this act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or the treaties with the United States.

The proviso to the above act, saving the rights of Mississippi Choctaws, was prepared by Representative John Sharp Williams and given to Mr. Curtis, in charge of the bill, who offered it as an amendment (Rec. 104).

Thereafter Mr. Owen prepared a circular, dated July 1, 1898, addressed "To the Mississippi Choctaws" and signed by Charles F. Winton, in which he informed the said Indians of the fact that he had induced Senator Walthall to pass a resolution through the Senate to secure information, and that he had solicited Mr. Allen, of Mississippi, to prepare the inclosed report (No. 3080 H. R., 54 Cong., 2d sess.); and that by the help of Mr. Williams, Senator Walthall, and Mr. Allen, he had the item directing a report by the Dawes Commission on the rights of said Indians inserted in the act of June 7, 1897. The circular then referred to the report of the commission as required by said act, and the provision in the act of June 28, 1898, relating to Mississippi Choctaws and also to the fact that both the commission and Judge Clayton had held that only Mississippi Choctaws who had removed and settled in good faith in the Choctaw Nation were entitled to citizenship, but that under the authority

of an item in the Indian appropriation bill allowing an appeal from this decision, he would appeal to this court to test their rights. The circular then went on to call attention to the importance of furnishing proof that each claimant was a descendent of a fourteenth-article claimant, and that he had secured a list of such claimants which he would make available to his clients as soón as practicable (Rec. 105, 106).

On December 2, 1898, the Dawes Commission, by printed circular and handbills sent through the mails and posted in conspicuous places throughout the neighborhoods in which the Choctaws in Mississippi were living, officially notified them of the time and places at which the commission would hear applications for identification under the Curtis Act, and explained in detail all of the steps necessary to secure identification under said act. The circular was addressed "To the Mississippi Choctaws," and set out the provisions of the act of June 28, 1898, authorizing their identification, and article 14 of the treaty of 1830; and in addition to giving them all the information necessary as to the proof they would be required to furnish they were informed that no charge would be made against any person appearing before the commission, and that no person outside of its own clerical assistants was in any degree authorized to speak for or act with it (Rec. 106, 107).

Thereafter the commission, through one of its members, A. S. McKennon, visited Mississippi with several clerks and stenographers and identified and

made a roll of 1,923 Mississippi Choctaws as being entitled to citizenship in the Choctaw Nation under article 14 of the treaty of September 27, 1830. There were, according to the estimate of the commission, not more than 2,500 descendents of Choctaws who had remained in Mississippi under article 14 of said treaty then living in that State. The rule adopted in making the roll was that the fact that a claimant was a full-blood Choctaw, whose ancestors were living in Mississippi at the date of the treaty, was sufficient evidence to justify placing his name on the roll as a Mississippi Choctaw under section 21 of the Curtis Act. This roll, commonly known as the "McKennon roll," was approved by the commission and forwarded with a report dated March 10, 1899, to the Secretary of the Interior, but was never approved by him as required by the Curtis Act. The commission attempted to withdraw the roll on December 20, 1900, but a duplicate copy had been retained in the Indian Office. The roll, however, was formally disapproved by the Secretary on March 1, 1907. The work of Commissioner McKennon in making this roll, covering a period of about three weeks, was interferred with and retarded by Charles F. Winton, who endeavored to prevent Indians from appearing for identification. (Rec. 107, 108.)

The commission in its report referred to the fact that certain white people (Charles F. Winton among the number) had secured contracts for one-half of the lands and moneys they might obtain with nearly every family; that the Indians were too ignorant to

appreciate what they were doing; and that such persons could render them no aid in securing their rights under the treaty; that Hon. John S. Williams, with the aid of Senator Walthall, had secured the legislation under which the commission was acting and could be trusted to look after their interests. Mr. Owen furnished Commissioner McKennon with a list of 16,000 Choctaws which he had prepared in 1899 while acting as attorney in the case of the *Choctaw Nation* v. *The United States*, which formed a part of the record in said case, and which aided Mr. McKennon in his official work (Rec. 107, 108).

Shortly after the McKennon roll was transmitted to the Secretary of the Interior, the Dawes Commission discovered that it was very inaccurate, containing many names that should have been omitted, and omitting many names of Indians who should have been identified. For these reasons another party was sent out by the commission to make a more accurate and complete roll of Mississippi Choctaws under the act of 1898. Hearings were commenced at Hattiesburg, Miss., in December, 1900, and were resumed at Meridian, Miss., on April 1, 1901, from which date continuous sessions were held at that and other places in Mississippi until the latter part of August of that year (Rec. 108, 109).

On February 7, 1900, Winton and his associates presented another memorial to Congress praying that the rights of Mississippi Choctaws should be so construed as to give them the rights of Choctaw citizen-

ship without removal, or that they should be permitted to have their rights determined by the courts. No action was taken by Congress on this request (Rec. 109).

The Indian appropriation act of May 31, 1900 (31 Stat. 236), contains two provisos, which read:

> *Provided*, That any Mississippi Choctaw duly identified as such by the United States Commission to the Five Civilized Tribes shall have the right, at any time prior to the approval of the final rolls of the Choctaws and Chickasaws by the Secretary of the Interior, to make settlement within the Choctaw-Chickasaw country, and on proof of the fact of bona fide settlement may be enrolled by the said United States Commission and by the Secretary of the Interior as Choctaws entitled to allotment: *Provided further*, That all contracts or agreements looking to the sale or incumbrance in anyway of the lands to be allotted to the said Mississippi Choctaws shall be null and void.

The first proviso was substantially the same as an amendment to the bill requested in a memorial of Winton and his associates to Congress on April 4, 1900. The last proviso was prepared by Mr. Williams and its passage secured by him with the assistance and cooperation of Senator Platt, they having been informed that a number of lawyers and other persons were securing contracts with the Mississippi Choctaws looking to the payment of certain shares of the prospective allotments to said Indians (Rec. 109).

The Dawes Commission, instead of construing the act of May 31, 1900, as a confirmation of the McKennon roll of 1899, construed it as prospective in its operation, and thereafter required all applicants for enrollment to furnish proof of descent from Choctaw Indians who had remained in Mississippi and received patents of land under article 14 of the treaty of 1830. This construction reversed the rule of evidence adopted by the commission in making the McKennon roll, that the ancestors of full-blood Choctaws then living in Mississippi should be presumed to have fully complied with the technical requirements of article 14 of said treaty. The result of this construction was that only six or seven applicants claiming as Mississippi Choctaws were enrolled under the act, although from 6,000 to 8,000 applications were filed in 1900 and 1901. The Secretary of the Interior on August 26, 1899, and again on October 19, 1900, had directed the Dawes Commission to follow the full-blood rule of evidence recommended in the report of the commission dated March 10, 1899, in the identification of Mississippi Choctaws (Rec. 110).

On June 13, 1900, the Choctaw Cotton Co. was organized and incorporated under the laws of the State of West Virginia for the purpose of financing the removal of the Mississippi Choctaws to the Indian Territory and acquiring locations there for them. Two-thirds of the stock was issued to said Owen and one-third to said Winton. Subsequently all contracts theretofore taken by the said Winton and his

associates were assigned to said company. On August 7, 1911, the company was dissolved and its charter annulled and surrendered by decree of the Circuit Court of Kanawha County, W. Va., and the stock retained in the names of Owen and Winton has been filed in the Court of Claims (Rec. 110).

On February 7, 1901, an agreement was entered into between the Dawes Commission and the Choctaw and Chickasaw Nations which provided for making tribal rolls on which allotments of land and distribution of tribal property of the two nations should be based, section 13 of which provided as to the Mississippi Choctaws that the McKennon roll should be confirmed and the full-blood Choctaws living in Mississippi, and those who had removed to Indian Territory, whose names have been identified by the commission, shall alone constitute the Mississippi Choctaws entitled to benefit under the agreement. Section 13 of the agreement was amended as the result of a conference between representatives of the Interior Department, the Dawes Commission, and the two tribes, so as to strike out confirmation of the McKennon roll and to require proof of identification under the acts of June 28, 1898, and May 31, 1900, instead of the full-blood rule of evidence. This agreement was never ratified (Rec. 110, 111).

During the making of the roll of Mississippi Choctaws, commenced April 1, 1901, at Meridian, Miss., by the Dawes Commission, which held continuous sessions there and at other places in Mississippi until

August, 1901, the conduct of Winton and his associates and James E. Arnold and Louis P. Hudson increased the work and retarded the progress of enrollment. Being advised by Owen and believing the roll made by Commissioner McKennon in 1899 was final and constituted a favorable judgment in behalf of the individual Choctaws whose names appeared thereon, the said Winton and his associates advised all Indians who had previously been enrolled not to appear again for identification (Rec. 112).

Winton, acting upon the advice of counsel, on June 20, 1901, began taking new contracts with individual Mississippi Choctaws living in Mississippi, in lieu of all contracts theretofore taken by him and his associates. The later contracts, instead of stipulating for one-half of their respective allotments, stipulated for a sum of money equal to one-half of the net recovery of and for said Indians in lands, money, or money values, and, unlike the earlier contracts, provided for the removal of Mississippi Choctaws from Mississippi to the Choctaw Nation. The later contracts were taken in a series from 1 to 834, beginning with the contract of Jack Amos, one of the defendants in this suit, and embraced about 2,000 persons. These contracts were also assigned to the Choctaw Cotton Co. (Rec. 112).

While the preparation of the identification roll of the Mississippi Choctaws was still in progress an agreement was entered into between the Dawes Commission and the Choctaw and Chickasaw Nations,

by sections 41, 42, 43, and 44 of which provision was made for the identification and enrollment of Mississippi Choctaws entitled, under article 14 of the treaty of 1830, to participate in the allotment and distribution of Choctaw-Chickasaw lands and funds. This agreement, after amendment in Congress, was approved by the act of July 1, 1902, and ratified by the Choctaws and Chickasaws on September 25, 1902 (32 Stat. 641). It was under this agreement, known as the Choctaw-Chickasaw supplemental agreement, that practically all of the Mississippi Choctaws were enrolled and secured their rights to allotment of Choctaw-Chickasaw lands. Section 41 of the agreement, as signed by the parties, did not contain the full-blood rule of evidence—that is, that full-blood Choctaws living in Mississippi should be presumed to be descendants of Choctaws who had complied with the requirements of article 14 of the treaty of 1830. This rule of evidence was subsequently introduced as an amendment by Mr. Curtis and was drafted by Assistant Attorney General Van Devanter and Mr. McMurray, attorney for the Choctaw Nation. Winton and his associates on April 24, 1902, presented a memorial to the Senate, the principal object of which was to have the discredited McKennon roll confirmed. This part of the memorial was embraced in a bill introduced in the Senate by Senator Harris, where it was adversely reported on (Rec. 112–114).

The passage of the act of July 1, 1902, *supra*, ratifying the said supplemental agreement and

amendments to sections 41 to 44, inclusive, was opposed by Mr. Owen and the associates of Winton, who protested against the conditions contained in the said amended sections relating to the Mississippi Choctaws as finally adopted (Rec. 114). The objections to the agreement included the full-blood rule of evidence contained in section 41 thereof (Rec. 10, 11, 12), under which practically all of the Mississippi Choctaws were identified and enrolled as citizens of the Choctaw Nation (Rec. 112).

The Dawes Commission received approximately 25,000 applications for enrollment as Mississippi Choctaws, of whom 2,534 were identified as entitled to such enrollment, and of this number, so identified, 956 failed to remove to the Indian Territory, or to submit proof of their removal and settlement within the time prescribed by law. The total number identified and finally enrolled, who received allotments as members of the Choctaw Nation, was 1,578; of these the names of only 833 appear on the roll of March 10, 1899 (the McKennon roll), and only 696 had contracts with Winton and his associates (Rec. 115, 116). Of those finally enrolled under the act of July 1, 1902, 137 were designated as new-born Mississippi Choctaws (Rec. 28, 132), and 187 were full-blood Mississippi Choctaw minors, who were enrolled under the provisions of section 2 of the act of April 26, 1906 (34 Stat. 137, 138)—a provision relating to all of the Five Civilized Tribes (Rec. 115).

All the contracts of Winton and his associates with Mississippi Choctaws were made from 1896 to 1901 with individual Choctaws living in Mississippi (Rec. 100, 112).

The Indian appropriation act of March 3, 1903 (32 Stat. 982), contained a proviso appropriating $20,000 to aid indigent and identified full-blood Mississippi Choctaws to remove to the Indian Territory, under which a special disbursing agent of the Dawes Commission was sent to Mississippi and succeeded in removing 420 such Indians to the Indian Territory. These Indians were maintained until they were subsequently placed on allotments, after which they were supplied with tools and other implements and rations for six months, and all of the expenses were paid by the Government (Rec. 115).

Winton and his associates in the month of March, 1903, removed 22 Mississippi Choctaws to the Indian Territory (Rec. 131, 132). The remainder of those who were enrolled and received allotments were removed at the expense of other parties (Rec. 121, 122, 123, 125, 127), or removed at their own expense.

The funds derived from sales of allotted lands of enrolled Mississippi Choctaws which were subject to restrictions upon alienation described in section 1 of the act of May 27, 1908 (35 Stat. 312), are held by the Government to the credit of individual Indians entitled thereto. All other funds belonging to said Indians are held as tribal funds. The Mississippi Choctaws, as required by section 41 of the act of

July 1, 1902, *supra*, are carried on a separate roll (Rec. 116).

The Court of Claims, upon the foregoing facts, held that there was no liability, under the jurisdictional act, on the part of the Mississippi Choctaws to pay the claim, and that there was no merit in the claim itself, and dismissed the petition. The chief justice, in a concurring opinion, took the further position that the Court of Claims had no jurisdiction of the subject matter of the suit. From this judgment of the Court of Claims an appeal was taken to this court.

ARGUMENT.

JURISDICTION.

When the contracts of employment were entered into between Winton and his associates and individual Mississippi Choctaws, living in Mississippi, the Indians were and had been for over a half a century citizens of the United States and the State of Mississippi, with all the rights, privileges, and immunities possessed by white citizens of that State, and the Government had no supervision or control over them or their contracts (Rec. 98, 99).

The contracts themselves recognized the status of the individual Indians with whom they were made as "being United States citizens" (Rec. 133). These contracts were submitted with appellants' petition as the evidence and basis of employment of Winton and his associates by the Mississippi Choctaws. The petition states "that the service was rendered not to

one individual, but to every individual who was enrolled and who obtained the right to this great estate" (Rec. 14).

There were 1,578 Mississippi Choctaws who were enrolled and received allotments of Choctaw-Chickasaw lands, and of these only 696 had contracts with Winton and his associates. There were 2,534 Mississippi Choctaws identified, but of these 956 did not remove from Mississippi, or if they did were never enrolled (Rec. 115, 116). Appellants' contracts provided for removal of the Indians from Mississippi to the Indian Territory, but they only removed 22 and then abandoned that stipulation of their contracts (Rec. 131, 132). The act of April 26, 1906, provided that suit should be brought "against the Mississippi Choctaws," and that judgment, if any, should be rendered on the principle of *quantum meruit*, in such *amount or amounts* as may appear equitable or justly due, and that the judgment, if any, should be paid from funds now or heretofore due such Choctaws by the United States (Rec. 96). Suit was instituted on October 11, 1906, by Winton and his associates. Thereafter the act of May 29, 1908, was passed amending the act of April 26, 1906, by allowing Vernon, Bounds, and Howe to intervene for themselves and their associates or assigns, and providing that the "judgments, if any, shall be paid from funds now or heretofore due such Choctaws *as individuals* by the United States"; and the claims of Winton and his associates and Vernon, Bounds, and Howe

and their associates were made liens upon the lands allotted to the Mississippi Choctaws (Rec. 96, 97). Thereafter an amended petition was filed by Winton and his associates claiming also under the provisions of the act of May 29, 1908.

The defendants contend that the jurisdictional act, as amended, clearly indicated that the suits were to be brought and the judgments rendered against the individual Mississippi Choctaws with whom appellants had their contracts. This position is strengthened by the fact that the funds derived from the sale of the allotments of Mississippi Choctaws were held by the Government to the credit of individual Indians (Rec. 116).

The Mississippi Choctaws, as a class, embraced not only those who received allotments, but also those who did not, the latter being approximately 1,000 persons.

Appellants in their petition claim not only against those who were enrolled and received allotments, but also against those who secured the right to receive allotments (Rec. 14). Of the 1,578 who received allotments the appellants can only show employment by 696 (Rec. 116). Therefore, under no aspect of the case were appellants authorized to represent the Mississippi Choctaws as a class.

Congress has no power to require citizens of a State to appear as defendants in the Court of Claims in respect to their private contracts, over which the Government has no control or supervision (Rec. 99).

Appellants abandoned their first set of contracts because these stipulated for one-half of the prospective allotments of said Indians in violation of the provisions of two acts of Congress and were not enforceable in the State courts (Rec. 100). On the advice of counsel they then took the contracts relied on in this suit, which stipulated for a sum equal to one-half of the value of their prospective allotments, the object being to secure contracts on which suits could be enforced in the State courts.

It is true that suits on such contracts would not have reached the allotments of the Indians, not subject to alienation by statute, but that was no bar to the jurisdiction of the State courts to consider the claims, for if judgment had been rendered against one of these defendants it might have been collected otherwise. (*Ke-tuc-e-num-quah* v. *McClure*, 122 Ind. 541.)

The fifth amendment to the Constitution of the United States declares that no person shall be deprived of life, liberty, or property without due process of law.

This article was construed in *Murray's Lessee et al.* v. *Hoboken Land Improvement Co.* (18 How. 272, 276), where the court said "due process of law" meant the same thing as the words "by the law of the land," and that the amendment is a restraint on legislative as well as the executive and judicial powers, and can not be so construed as to leave Congress free to make any process "due process of law" by its mere will.

Mr. Cooley, in his work on the principles of constitutional law, third edition, page 244, says, "Whatever the State establishes will be due process of law, so that it be general and impartial, and disregard no provision of the Federal law or State constitution."

The compiled laws of the State of Oklahoma provided for the filing of suits in the State courts and the issuance and delivery of summons (secs. 5591, 5598), and that suits for any estate or interest in lands should be brought in the county where the lands are situated (sec. 4985); and that in order to make a judgment a lien upon lands a certified copy of the judgment must be recorded in the office of the registrar of deeds of the county in which the land is situated (sec. 5622). The constitution of Oklahoma (art. 2, sec. 19) declares "that the right of trial by jury shall be and remain inviolate."

The seventh amendment to the Constitution of the United States declares "that the right of trial by jury shall be preserved"; and the Judicial Code (sec. 235) declares: "The trial of issues of fact in the Supreme Court in all actions at law against citizens of the United States, shall be by jury."

This court held many years ago that the Mississippi Choctaws and other Indians who were citizens of the United States come within the jurisdiction of the State and Federal local courts, and are entitled to all the rights in those courts possessed by other citizens. (*Wilson* v. *Wall*, 6 Wall. 83; *Elk* v. *Wilkins*, 112 U. S. 94; *Feliz* v. *Patrick*, 145 U. S. 332.) Prior

to the entry of Oklahoma into the Union, November 16, 1907, appellants could have brought suit on their contracts in the United States courts provided for the Indian Territory. (*Stevens* v. *Cherokee Nation*, 174 U. S. 445, 449.)

The decision of this court in *Green* v. *The Menominee Tribe of Indians* (233 U. S. 558, 568) is conclusive in the instant case.

That suit was brought in the Court of Claims under a special act of Congress (47 C. Cls. 281) for supplies furnished to individual members of the tribe to enable them to engage in logging operations upon the faith of an alleged verbal promise by the tribe to guarantee payment. The lower court dismissed the claim against the tribe because the contract was not in writing and approved, as required by sections 2103–2106 of the Revised Statutes, and dismissed the claims against the individuals because such suits came properly within the jurisdiction of the State courts of Wisconsin.

The Court of Claims (pp. 284, 285) said:

> It will be observed that the provisions of section 2103 of the Revised Statutes referred to apply only to those Indians who were "not citizens of the United States." *It follows that if they were citizens of the United States at the time of the alleged agreement the courts of Wisconsin had jurisdiction to adjudicate such claims, whether such contract be treated as express or implied.* (*Stacy* v. *La Belle*, 99 Wis. 524; *Ingraham* v. *Ward*, 56 Kans. 550, and cases there cited.) If they were not citizens of the United

> States, then the agreement so made can not be enforced in this court, as the same was not reduced to writing with the approval of the Secretary of the Interior, as provided by statute. [Italics ours.]

The court, discussing the opinion of the Court of Claims, said that court held that the jurisdictional act created no new right in favor of the petitioner, except the waiving of the statute of limitations, and simply afforded the plaintiff a forum for the adjudication of his claim and "From this premise the conclusion was deduced that the act gave no right to sue the United States and conferred no jurisdiction upon the court below over claims against an Indian as a mere individual aside from his membership of the tribe"; that the Court of Claims "consequently decided that it was not concerned with any supposed liability of the individual defendants as citizens of the United States resulting from their purely individual and personal contracts." The conclusion of the Court of Claims, indorsed by this court, was to the effect that the lower court had no jurisdiction of claims against individual Indians, because there existed in the State of Wisconsin a forum for their adjudication.

The cases cited by appellants in support of the jurisdiction of the court, with the exception of *Butler and Vale* v. *The United States* (43 C. Cls. 497), were suits against the United States by tribes of Indians, where the fund was created or judgment

rendered through the efforts of attorneys. Its distribution was under the control of the Court of Claims, and the jurisdictional act provided that the Court of Claims should fix the fees of the attorneys. The suit of Butler and Vale *supra*, was brought against the United States under a special act of Congress to recover compensation for services rendered to an Indian tribe in securing legislation in Congress. The attorneys in that case were employed by the tribe and the contract was approved as required by sections 2103–2106 of the Revised Statutes, and hence has no application to the instant case.

The contracts between appellants and the individual Indians provided for one-half of the value of the net recovery of, or for, the parties of the first part in land and money, or money values, as Mississippi Choctaws, or as citizens of the Choctaw Nation, one-third of the said compensation to become due one year and one day from the date of the patents issued to the parties of the first part, one-third three years and one day from the date of said patent, and the remaining one-third five years and one day from the date of said patent.

This court has held that allotments to Indians, notwithstanding restrictions upon their sale, became vested in fee simple in the allottees upon the receipt of their patents (*Libby* v. *Clark*, 118 U. S. 250–255; *Ballinger* v. *Frost*, 216 U. S. 240–250).

At the time the alleged claims which constitute the basis of this suit became due, the State of Okla-

homa had been admitted to the Union and had adopted a constitution and enacted a system of laws for the settlement of suits and controversies between citizens, among whom were the Mississippi Choctaws, the defendants herein. The laws of the State of Oklahoma providing for the institution of suits for the settlement of controversies was the "law of the land," and hence any requirement that the Mississippi Choctaws should become defendants in the Court of Claims in this suit is a taking of their property rights "without due process of law."

Jurisdiction having been refused in the *Green case, supra*, of a claim for supplies against individual tribal Indians whose funds were held in trust as tribal funds by the Government, should foreclose the contention in the instant case of jurisdiction over claims against individual Indians who were citizens of the United States and the State of Mississippi, not under the jurisdiction or control of the Government in any respect, the claims growing out of express contracts in writing, and whose funds received long afterwards, from the sale of allotted lands, were held to the credit of such individual Indians.

LIABILITY.

Appellants assert that they are entitled to compensation from all of the Mississippi Choctaws who received allotments under the legislation enacted in Congress by appellants' efforts, whether they were employed by the Indians or not.

They argue that it is analogous to a case where a party claims an interest in property and brings a suit in equity for himself and all others interested in like manner in the subject matter of the suit, the result being to create a trust fund, or to bring the property within the control of the court for administration, so as to render the persons interested liable to pay their pro rata share of the cost and expenses of the suit. (*Trustees* v. *Greenough*, 105 U. S. 527; *Central R. R.* v. *Pettus*, 113 U. S. 116; *Harrison* v. *Perea*, 168 U. S. 311.)

This suit, on the contrary, is an action at law. The liability on a *quantum meruit* rests on an implied promise to pay for services rendered and is technically an action in *assumpsit*. The jurisdictional act by directing the court to render judgment "in such amount or amounts as may appear equitable and justly due" does not change the character of the suit from an action at law to one in equity. The act creates no liability, but merely provides a forum for the adjudication of the claim according to applicable legal principles. (*Sac and Fox Indians*, 220 U. S. 481, 489; *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500.) The alleged services in the instant case were not rendered in a court of law or equity, but were rendered in securing legislation in Congress. No fund was created or property brought within the control of the court by reason of such services. The property from the time the rights of the Mississippi Choctaws accrued under the treaty of September

27, 1830, was under the complete control of the executive department of the Government, and has remained under its control until the allotment or distribution in severalty to said Indians. The contracts stipulate payment by the individual Indians after the receipt of their allotments and funds by them, and the jurisdictional act provides payment of the judgment from the funds due such Indians as individuals by the United States, when it could no longer be considered as a trust fund. Therefore the doctrine of equitable distribution could have no application to a case of this kind.

To invest the Court of Claims with jurisdiction of the parties and the subject matter of the suit, the employment must have been by all of the Mississippi Choctaws who received allotments in order to entitle the appellants to recover from them as a class. Winton and his associates had contracts with only 696 of the 1,578 Indians who received allotments. Most of the other Indians had contracts with other parties, and 137 of them were not born until after the alleged services were rendered and the legislation enacted. There could under the circumstances have been no presumption of an agreement as a class to pay for such services.

The contracts, however, were not carried out in accordance with their terms. Hence there could have been no liability even if all of them had made contracts with appellants.

The right to share in the Choctaw-Chickasaw lands in the Indian Territory was given to the members of

the tribe who remained in Mississippi by article 14 of the treaty of 1830, and was contingent upon their removal to the Choctaw country. Those Mississippi Choctaws who removed and made application under the act of 1896 within the three months specified were enrolled with respect to the tribal lands upon the same footing as other Choctaws. After the time limit had expired they had the same right as before, but there was no way in which it could be asserted. Sections 41 to 44 of the act of July 1, 1902, simply extended the time for making applications for enrollment, and made the identification of full bloods easier, but placed certain limitations upon settlement in the Choctaw country in order to show that the removals had been made in good faith. The contracts were indivisible and removal was just as necessary to secure allotment as identification, and both were conditions required of the individual Indians.

More than one-third of those identified never furnished any proof of removal and settlement in the Choctaw country, and to this day have never received allotments of Choctaw-Chickasaw lands.

When appellants contracted to remove the Mississippi Choctaws it was as much a part of the contract as the agreement to secure legislation allowing their identification and enrollment. Their reason for the abandonment of the stipulation for removal was lack of funds to carry it out.

This court has repeatedly held that where a party, competent to act, enters into a lawful contract pos-

sible of performance, the party so charging himself must make it good unless the act of God, the law, or the other party renders its performance impossible. Unforeseen difficulties, however great, will not excuse him. (*Dermot* v. *Jones*, 2 Wall. 7; *The Herriman*, 9 Wall. 161, 172; *Railroad Company* v. *Smith*, 21 Wall. 255.)

Even if appellants had removed the 696 Indians with whom they had contracts, and who were enrolled and received allotments, it would have been no evidence of their employment by the 1,578 Mississippi Choctaws who were enrolled and received allotments under legislation for the enactment of which appellants claim compensation. The greater part of those with whom they had contracts also had contracts with other parties who were intervenors in this suit, and 137 of them, born after the removal of the Mississippi Choctaws to the Indian Territory, had no contracts at all.

MERITS.

The Court of Claims has found that all of the legislation passed by Congress under which the Mississippi Choctaws received allotments was suggested or prepared by the Hon. John Sharp Williams, in conjunction with Senator Walthall in the Senate and Representative Curtis in the House, until March 4, 1903. The interest of Mr. Williams in these Indians was perfectly natural, as practically all of the full-blood Choctaws in Mississippi lived in his congressional

district. It is true that Mr. Owen early in 1896 first called the attention of Mr. Williams to the rights of these Indians under article 14 of the treaty of September 27, 1830, to participate in the allotment of Choctaw-Chickasaw lands in the Indian Territory, and left a copy of the treaty with him. Thereafter until March 4, 1903, when his county was placed in another district, Mr. Williams was consulted on all pending legislation in Congress concerning the Mississippi Choctaws (Rec. 100, 101).

The Dawes Commission also stated in March 10, 1899, in its opinion on the McKennon roll, that Mr. Williams, in whose district the Choctaw Indians for the most part lived, had, with the aid of Senator Walthall, secured the legislation under which it was then acting, and might be safely trusted to further look after their interests (Rec. 108).

Appellants have admitted those facts in a circular addressed to the Mississippi Choctaws, dated July 1, 1898, where in effect they claim that legislation up to that time had been secured through Mr. Williams, Mr. Allen, and Senator Walthall at their solicitation (Rec. 105); in other words, through services for which there can be no recovery (*Trist* v. *Child*, 21 Wall. 441).

Appellants made an application to the Dawes Commission for the enrollment of Jack Amos and 97 other Choctaws living in Mississippi under the act of June 10, 1896 (29 Stat. 321). This was rejected on the ground that their removal to the Indian Territory

was necessary to entitle them to such enrollment, and the ruling of the commission was sustained by the courts (Rec. 102). The probable effect of this action was to prevent Mississippi Choctaws from removing to the Indian Territory and securing their enrollment under the act of 1896.

Appellants also filed several memorials asking Congress to enact legislation granting Mississippi Choctaws the right to receive allotments of Choctaw-Chickasaw lands and retain their residence in Mississippi (Rec. 101, 155).

The language used in article 14 of the treaty of 1830 would appear sufficiently clear to convince any reasonable man that such a construction is not sound.

After the appellants became convinced that Congress would not pass such legislation they changed their tactics and memorialized Congress to confirm the inaccurate and discredited McKennon roll (Rec. 108, 109). The act of May 31, 1900, which the appellants advocated for that purpose, was a positive injury to the Mississippi Choctaws (Rec. 109, 110), as it retarded and sidetracked other legislation,

Their proposed amendment to section 41 of the act of July 1, 1902, also had in view the confirmation of the McKennon roll (Rec. 112, 113).

The full-blood rule of evidence contained in section 41 of the act of July 1, 1902, as it was finally passed, was drafted by Assistant Attorney General Van Devanter and Mr. McMurray, attorney for the Choctaw

Nation (Rec. 113, 114), and under this provision practically all of the Mississippi Choctaws who received allotments were identified (Rec. 112).

Sections 41 to 44 of the act of July 1, 1902, were passed over the objection of appellants (Rec. 114) because of the full-blood rule of evidence, as well as other limitations (Rec. 12).

The effect of these efforts of appellants was to retard and make more difficult the passage of legislation, which was really beneficial to the Mississippi Choctaws. Congress considered it necessary to safeguard the interests of the Choctaw Nation, as well as the Mississippi Choctaws, and to prevent identified Mississippi Choctaws from removing to the Choctaw Nation, securing allotments and then returning to Mississippi, and also to prevent the hordes of imposters, some 25,000 in number, from all over the country, securing identification as Mississippi Choctaws. It was to the interest, of course, of the attorneys for appellants to secure the identification of as many persons as possible.

The record shows that Mr. Williams was always ready to safeguard the interests of genuine Mississippi Choctaws wherever possible (Rec. 104), and that he was principally instrumental in securing the enactment of all of the legislation under which they finally received their allotments, while appellants not only hampered legislation, but seriously interferred with the work of the Dawes Commission in making up the rolls (Rec. 107, 108, 111).

For the reasons stated it is respectfully submitted that the judgment of the Court of Claims dismissing the petition should be affirmed.

HUSTON THOMPSON,
Assistant Attorney General.
GEORGE M. ANDERSON,
Attorney.

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8-9-12

In the Supreme Court of the United States

October Term, 1916.

JOHN LONDON, WALTER S. FIELD, MADISON M. LINDLY, AND KATIE A. HOWE, EXECUTRIX, INTERVENORS, APPELLANTS.

vs.

JACK AMOS AND OTHERS KNOWN AS "THE MISSISSIPPI CHOCTAWS," APPELLEES.

MOTION FOR WRIT OF CERTIORARI, WITH BRIEF, AFFIDAVIT AND NOTICE, AND ACKNOWLEDGMENT OF SERVICE.

Gunn Mason,
Attorney for Appellants
in Nos. 926, 927 and 928.

In the Supreme Court of the United States

October Term, 1916.

JOHN LONDON, WALTER S. FIELD, MADISON M. LINDLY, AND KATIE A. HOWE, EXECUTRIX, INTERVENORS, APPELLANTS. VS. JACK AMOS AND OTHERS KNOWN AS "THE MISSISSIPPI CHOCTAWS," APPELLEES.	Nos. 926, 927 and 930

MOTION FOR WRIT OF CERTIORARI.

Come now the appellants, John London, Walter S. Field, Madison M. Lindly and Katie A. Howe, Executrix of Chester Howe, deceased, by Guion Miller, their counsel, and suggest the diminution of the record in this cause, in this, to-wit:

1. The said record does not contain the Tentative Findings of Fact and Opinion of the Court handed down by the Court of Claims of the United States, December 7, 1914.